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CITATIONS

Cases:

In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 58

A. L. MECHLING BARGE LINES, INC., ET AL., APPELLANTS

v.

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION

No. 59

BOARD OF TRADE OF THE CITY OF CHICAGO, APPELLANT

v.

UNITED STATES OF AMERICA, INTERSTATE COMMERCE COMMISSION, THE NEW YORK CENTRAL RAILROAD COMPANY, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF ILLINOIS, EASTERN DIVISION

BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the district court (R. 74) is reported at 209 F. Supp. 744. The decision of the Interstate Commerce Commission (Division 2) (R. 9–29) is reported at 310 I.C.C. 437. The proposed

report of the Commission's hearing examiner is set forth at pages 32–52 of the transcript of record.

JURISDICTION

The judgment of the district court was entered on September 18, 1962 (R. 81). Separate notices of appeal were filed by A. L. Mechling Barge Lines, Inc., et al., and the Board of Trade of City of Chicago on November 16, 1962 (R. 82–87). Probable jurisdiction was noted on June 17, 1963 (R. 837). 374 U.S. 823. The jurisdiction of this Court on appeal rests on 28 U.S.C. 1253 and 2101(b).

QUESTIONS PRESENTED

1. Whether the Interstate Commerce Commission may grant relief from the long haul-short haul provision of Section 4 of the Interstate Commerce Act without passing on a contention, raised by the pleadings and supported by evidence at a hearing, that a term of the proposed rate violates Section 3(1) of the Act.

2. Whether the evidence in the record supports the Commission's conclusion that the proposed rate did not constitute a destructive competitive practice.

3. Whether the Commission adequately considered a contention that evidence pertaining to alleged violations of Section 3(4) had been erroneously excluded by the hearing examiner.

STATUTE INVOLVED

The provisions of the National Transportation Policy, preceding 49 U.S.C. 1, and Sections 1(5), 3(1), 3(4), 4(1), 13(1) and 15(7), 49 U.S.C. 1(5),

3(1), 3(4), 4(1), 13(1), and 15(7) are set forth in the Appendix, *infra*, pp. 40–44.

STATEMENT

This is a direct appeal from a final judgment of a three-judge district court dismissing a complaint seeking to set aside an order of the Interstate Commerce Commission. The Commission's order, entered under Section 4 of the Interstate Commerce Act, permitted the New York Central and its connecting rail carriers to institute a rate structure under which lower rates were charged for certain longer hauls than for shorter hauls on the same route.

1. THE SITUATION PRIOR TO THE PROPOSED RATES

The New York Central Belt Line west of Kankakee, Illinois, roughly parallels the Illinois River, on which Mechling Barge Lines, Inc., operates its barges. The Belt Line is in competition with Illinois River barge lines for the business of transporting corn from northern and central Illinois to intermediate points for reshipment to destinations on the eastern seaboard. Farmers located in northern and central Illinois are in a position to sell their corn either (1) to elevators located along the river for transportation by barge to an east-west railroad or (2) to elevators located along New York Central's Belt Line for transportation by the Belt Line to a connecting east-west railroad. Since the elevators bear the cost of this transportation, the amount they can bid for this corn is significantly affected by rates they must pay (R. 13, 15–16).

At one time, corn from the affected area moved over all-rail routes to eastern destinations. About 24 years ago, the development of commerce on the Illinois River started a diversion of traffic from the all-rail routes to barge-rail routes. Corn or corn products began to move first by barge from river ports to Chicago, and then by rail from Chicago to eastern destinations. As a result of this diversion, corn traffic on the Belt Line almost vanished (R. 13). The little corn the Belt Line continued to carry was principally corn owned by the Commodity Credit Corporation. Such corn is usually shipped by rail for export and is charged a special rail export rate which is less than the domestic rate for corn or corn products (*ibid.*).

Barge lines were successful in capturing so much of the traffic for the following reason: Historically, the rail rates on grain and grain products from the affected territory to eastern destinations were composed of combinations of rail rates to and from Chicago. Later when single-factor rates were established they were made equal to these combinations. Thus, before the proposed rates [1] went into effect the rail rate from origins on the Belt Line to eastern destinations was 72 cents for corn and 72.5 cents for corn products [2] via Chicago (including Chicago via Kankakee) (R. 320), either as a through rate or as a combination of the 23-cent local rate to Chicago and the 49 or 49.5-

[1] Even though the rates now under attack have been in effect for six years (see *infra*, pp. 9–10), we shall refer to them as "proposed rates" for the sake of simplicity.

[2] The rates on corn products were uniformly 0.5 cent higher than those on corn (R. 11).

cent proportional rate[4] to the East. On the other hand, the average barge rate on corn and corn products, in competition with the Belt Line from ten ports along the Illinois River, to Chicago, was 4.625 cents (effective December 1957, this average barge rate was raised to 4.825 cents) (R. 12). Such corn and corn products could then be shipped to the East by rail for 49 or 49.5 cents, just as the corn shipped to Chicago by rail. Therefore, the barge-rail rate for corn from Illinois River points to eastern destinations was substantially cheaper (approximately 19 cents) than the all-rail rate.

2. THE PROPOSED RATES

In order to recapture the traffic which had been lost to competing barge lines, the New York Central and its connecting carriers proposed a rate structure

[4] The following definitions of terms will be helpful to an understanding of the grain rate structure with which this case is concerned.

Ex-barge corn—Corn transported from a point by rail which has been shipped to that point by barge.

Ex-rail corn—Corn transported from a point by rail which has been shipped to that point by rail.

Flat rate—A rate of unrestricted application which is not dependent on prior or subsequent transportation.

Proportional rate—A rate which is restricted to traffic having prior or subsequent transportation and is only a portion of the total transportation charge.

Joint through rate—The total rate from the origin to the final destination published as a single rate covering the entire movement.

Transit—The privilege of stopping grain or grain products at any point for storing, processing, and subsequent shipping.

Division—The share of a joint through rate received by any of the participating carriers.

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featuring a new proportional rate of 5 cents (now 6 cents because of general rate increases) on shipments from origins along the Belt Line to Kankakee or Chicago (R. 11, 320). This proportional 6-cent rate does not apply to shipments from origins on the Belt Line ending at Chicago or Kankakee; it is available only to traffic destined for points in the East, and only to corn milled in transit. Hence the 6-cent rate is available only in conjunction with the existing rate on rail shipments to traffic destinations in the East. The single factor rate for through movements from these origins to the East is inapplicable when the proposed proportional rate is lower (R. 11–12).

The mechanism by which the rate reduction is accomplished is as follows: Shipments originating on the Belt Line are charged the local or flat rate of 23 cents to Kankakee. If the corn products (which have been milled in transit) are shipped east, the inbound charges are adjusted to receive the benefit of the lower proportional rate to Kankakee. Accordingly, a credit of 17 cents is applied to ex-rail corn products which are moved eastward by rail whether on the New York Central or its connecting carriers (R. 13). Thus the 6-cent proportional rate is not reflected as a separate charge but as a credit on movements to eastern destinations of corn products on Belt Line corn which has been milled in transit (R. 25).

The New York Central and its connecting carriers filed the proposed rates to become effective on December 15, 1956, and they were permitted to become effective at that time without protest. The proposed rates

resulted in greater charges for a shorter haul than for a longer haul along the same line, since, by reducing the rates from origins on the Belt Line to the East, the rates for these longer hauls became lower than those applying to the shorter distances from Kankakee and points east, north, and south of Kankakee to the eastern destinations. In other words, under the proposed rate it became less expensive to ship corn products from origins on the Belt Line to the East than from Kankakee and points east, north, and south of Kankakee to the East. For example, the charge for shipping corn products from Moronts, Illinois, to New York City under the proposed rate structure was 54½ cents, *i.e.*, a 5-cent rate to Kankakee, Illinois plus the 49½ cent proportional rate from Kankakee to New York. On the other hand, a shipment originating from Kankakee itself was charged the full flat rate of 66 cents to New York City. Similarly, the rate charged for shipments originating at Hamilton, Indiana, or Butler, Indiana, to New York City was 56 cents, or 1½ cents more than from Moronts, even though these points were at least 200 miles closer to New York (R. 147).

3. COMMISSION PROCEDURES FOR OBTAINING SECTION 4 RELIEF

Section 4 of the Interstate Commerce Act prohibits a carrier from charging rates which are higher for a long haul than for a shorter haul along the same line. In "special cases," however, the Commission is authorized to relieve a carrier from the operation of Section 4.

Under the Commission's Rules and Regulations, carriers seeking such "Section 4 relief" are required to file a detailed application setting forth the facts and circumstances justifying a departure from the long haul-short haul principle. 49 C.F.R. 143.75–143.85. When such an application is filed, the Commission refers it to a staff group of three rate specialists known as the Fourth Section Board, which operates informally. 49 C.F.R. 1.200. Notice of the application is given in the Federal Register, and the Commission's rules of practice now require that notice be given to competing water carriers. 25 Fed. Reg. 6631, July 14, 1960. 49 C.F.R. 143.81(a)(8). Protests must be filed within 15 days. 49 C.F.R. 1.40. Either the applicant or a protestant may request a hearing. The Commission's practice is to order a hearing whenever one is requested by an interested party. It may also—and sometimes does—order a hearing even though no party has requested one, and even though no protests have been filed.

If, at the end of the 15-day period, no protest has been filed, the Fourth Section Board may either refer the case to the Commission with its recommendation, or may decide the case itself. Although the Commission ordinarily does not make any findings in such cases, it does not grant temporary or permanent authority unless it is satisfied that the statutory criteria are met, namely (1) that there is a "special case" based on circumstances other than potential water competition and (2) that the long-haul rates are "reasonably compensatory." In cases where there is neither protest nor hearing—and these constitute the bulk of

the Section 4 proceedings—the Commission ordinarily takes final action on the application within 30 days after it has been filed.

If the matter is set for hearing, however, the Commission may grant temporary authorization pending the hearing and determination of the application for permanent relief. The Commission makes its decision whether to grant temporary relief on the basis of the application, the protest, and any comments by interested parties. Until recently, the Commission generally has not made any findings when granting temporary authority. See *A. L. Mechling Barge Lines, Inc.* v. *United States*, 368 U.S. 324. At the hearing on the question of permanent authority, both the applicant and the protestants have the opportunity to offer the testimony of witnesses, who are sworn and are subject to cross-examination. 49 C.F.R. 1.74.

4. PROCEEDINGS BEFORE THE HEARING EXAMINER AND THE COMMISSION

When the proposed rates were filed, New York Central and its connecting carriers believed that Section 4 relief previously granted by the Commission covered all Section 4 departures caused by the new rates. In fact, however, the new departures had not been previously authorized (R. 12). When this was discovered, the rail carriers filed an appropriate application for Section 4 relief (R. 138).

In response to this application, numerous protests were filed urging that the relief be denied (R. 96, 123, 128, 167, 177, 234, 245, 248). In addition, some protestants filed petitions for suspension of the rates under

Section 15(7) (R. 96, 123, 126, 133, 135). In some instances these papers were entitled "Protests and Petition for Suspension * * *" (R. 96, 123). Protestants not only challenged the validity of the proposed rate structure under Section 4, but also alleged violations of the National Transportation Policy (R. 112, 124, 195, 197, 238, 241, 250) and of Sections 1 and 3 of the Act (R. 112, 131–132, 136, 137, 171, 180, 194, 197, 237, 241). The railroads answered all of these attacks in a single reply to the various protests and petitions for suspension (R. 252).

Thereafter, suspension of the proposed rate revision was denied, and the rail carriers were given temporary relief pending a hearing (R. 87, 88–89). Division 2, acting as an appellate division of the Commission, affirmed the denial of suspension and the grant of temporary relief (R. 90, 92). On August 21, 1957, certain of the appellants brought suit in the United States District Court for the Northern District of Illinois to suspend the Commission's temporary Section 4 order, and they secured a temporary restraining order, but the order was vacated on November 28, 1957, when the action was dismissed for want of jurisdiction. The rates which are the subject of the Commission order now under attack have thus been in effect for six years (R. 10).

The rail carriers' application for Section 4 relief proceeded to hearing before an examiner. At the hearing the protestants renewed their objections to the proposed rates, contending that they violated not only Section 4, but other provisions of the Act as well.

A. ALLEGED VIOLATIONS OF SECTION 3(1)

The Chicago Board of Trade and others introduced evidence in support of their contention that the proposed rates would violate Section 3(1) of the Interstate Commerce Act, which prohibits undue discrimination among shippers and localities (R. 26). They charged that such discrimination resulted because the proposed rate was restricted to corn milled in transit (R. 104–105, 365–369). Therefore, those grain merchants who ship whole corn east cannot take advantage of the proposed 6-cent rate but are required to pay the higher 23-cent flat rate. Corn processors who sell corn products, on the other hand, are able to mill the corn in transit and thereby take advantage of the reduced rate. Because they know that the 6-cent rate is available to them, corn processors are able, in the purchase of corn from points along the Belt Line, to outbid grain dealers who deal in whole corn. The Chicago Board of Trade also alleged that Chicago corn processors are discriminated against by the proposed rate because certain territorial restrictions in the proposed tariff favor Kankakee processors (R. 26, 103–104).

The hearing examiner accepted all of the evidence offered with respect to these contentions, but both he and the Commission declined to rule on whether the proposed rates did violate Section 3(1). The reason given for this was that "[a]lthough the New York Central intends to remove the milling-in-transit limitation,[*] these issues do not directly deal with the fourth-

[*] The milling-in-transit limitation has not as yet been removed, so far as can be ascertained.

section principles here involved, but are properly matters which may be raised in investigation or complaint proceedings" (R. 26–27, 49). The Commission did, however, note that "there is no indication of undue damage to Chicago" (R. 27, 49).

B. ALLEGED VIOLATIONS OF SECTION 3(4)

During the proceeding before the hearing examiner, it was admitted that the New York Central received a 13-cent division of the reshipping rate from Kankakee via Chicago to the East (R. 340). Mechling claimed that this division supported its suspicions and allegations of discrimination against barge lines carrying corn to Chicago (R. 237). Such discrimination, it was urged, would violate Section 3(4) of the Interstate Commerce Act, 49 U.S.C. 3(4), which prohibits discrimination between connecting carriers. Mechling's position was that when corn comes to Chicago by rail over the Belt Line, and qualifies for the proposed rate, a credit of 13 cents is given to the New York Central by connecting carriers on rail movements to destinations in the East, whereas ex-barge corn is charged the full rate of 49 or 49.5 cents for the same movement from Chicago to the East. It was urged that this practice of charging less for ex-rail transportation than ex-barge transportation violated Section 3(4) (*Interstate Commerce Commission* v. *A. L. Mechling Barge Lines,* 330 U.S. 567) even when accomplished through a division of rates (*Dixie Carriers* v. *United States,* 351 U.S. 56) (R. 237, 342–3).

When Mechling sought to pursue this issue upon cross-examination of a witness, the hearing examiner blocked the inquiry upon the ground that it was not relevant in a Section 4 proceeding (R. 342–3, 352). Neither the examiner's report nor the Commission's decision discussed the Section 3(4) issue.

C. ALLEGATIONS THAT THE PROPOSED RATE WAS NOT COMPENSATORY

The protestants introduced evidence to show that the proportional rate to Kankakee was below the out-of-pocket costs which the New York Central incurred on this transportation. Therefore, it was charged, relief could not be granted under the exception to the proviso in Section 4. Moreover, it was argued that the non-compensatory proportional rate also violated Section 1(5) and the National Transportation Policy. The Section 4 argument was based on the premise that the rate to Kankakee was a rate "to or from the more distant point" which, under Section 4, must be reasonably compensatory if relief is to be granted (R. 25). The Section 1(5) argument was based on the premise that any rate which does not cover out-of-pocket costs is *per se* not "just and reasonable" (R. 112, 137, 197, 236–237, 241). The National Transportation Policy argument was based on the premise that the setting of a noncompensatory rate which captures traffic from the barge lines while producing no increase in revenue to the rail carrier is an "unfair or destructive" competitive practice (R. 112, 124, 189–190, 197, 238, 241).

The hearing examiner found that the proportional rate from the origins on the Belt Line to Kankakee

or Chicago was less than the out-of-pocket cost to New York Central (R. 49, 50, 51), and that the proposed rates were "lower than necessary to meet the barge competition" (R. 51). He therefore denied the rail carriers' request for Section 4 relief.

The Commission reversed the examiner. It stated that the proportional rate from origins on the Belt Line to Kankakee or Chicago "has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origin" to the East (R. 25). It reasoned that if it were to deny Section 4 relief because of a finding that the proportional rate was not reasonably compensatory although the through combination was, the railroads could cure the defect by merely refiling a new through-rate eliminating the proportional rates (R. 25). It also determined that since the barge lines attracted that corn grown adjacent to the river and the railroad attracted that corn grown adjacent to the Belt Line, the proposed rates were not lower than necessary to meet the barge competition and did not constitute destructive competition (R. 26, 28). The Commission therefore granted the Section 4 relief requested by the New York Central and its connecting carriers (R. 29–30).

5. PROCEEDINGS IN THE DISTRICT COURT

Appellants, Mechling Barge Lines, Inc. and several grain operators, brought an action in the district court to enjoin the order of the Commission. They alleged that the Commission's authorization of Section 4 relief was improper because the proposed rates were

not compensatory, were destructive of competition, and did not preserve the inherent low-cost advantage of the barge lines in violation of Section 4 and of the National Transportation Policy. They also alleged that the Commission erred in refusing to permit cross-examination concerning discrimination against barge transportation in violation of Section 3(4) (R. 7). The Chicago Board of Trade was permitted to intervene as plaintiff, and it challenged the Commission's order on the ground that the rates were unduly prejudicial against shippers and localities in violation of Section 3(1) (R. 64, 65).

The district court entered its judgment dismissing the complaint on September 18, 1962 (R. 81). It held that the Commission did not have to consider whether the proposed rates violated any other section of the Interstate Commerce Act in a Section 4 proceeding (R. 77); that there was substantial evidence to support the Commission's finding that a "special case" for the departure from Section 4 existed (R. 78–79); and that the rate was not lower than necessary to meet competition (R. 79–80). It also sustained the Commission's determination that the rate from origins on the Belt Line to Kankakee or Chicago was not the relevant one to consider in determining whether the proposed rate was reasonably compensatory (R. 78).

INTRODUCTION AND SUMMARY OF ARGUMENT

Section 4 of the Interstate Commerce Act, 49 U.S.C. 4, prohibits railroads from charging more for a shorter haul than for a longer haul along the same line. The same section gives the Interstate Commerce

Commission authority in "special cases" to permit such discrimination. The instant case arose out of an application by the New York Central Railroad and its connecting carriers asking that the Commission grant such "special case" relief from Section 4 for certain reduced rates on corn from origins on the New York Central's Belt Line when shipped East through Kankakee and milled in transit.

The Chicago Board of Trade contends that the Commission erroneously refused to decide whether the proposed rate discriminated against grain merchants dealing in whole corn and against Chicago interests in violation of Section 3(1) of the Act. A. L. Mechling Barge Lines, Inc. complains that it was not allowed to show that one feature of the proposed rate structure discriminated against connecting barge lines at Chicago in violation of Section 3(4) of the Act. Appellants also object to the Commission's failure to pass on the allegation that one of the components of the long-haul rate (the "proportional rate" from origins on the Belt Line to Kankakee) brought in no additional revenue to the railroads, and that it therefore violated Section 4 itself as well as Section 1(5), and unlawfully contravened the provisions of the National Transportation Policy.

The Commission decided only that the barge competition constituted a "special case," that the proposed rate was "reasonably compensatory," and that it did not constitute a destructive competitive practice. It refused to decide any of the other issues presented at the hearing. We believe that in the circumstances of this case the Commission's refusal to decide those is-

sues constituted error, and that its determination that the proposed rate did not amount to predatory competition was based on inadequate evidence.

I

The Commission erred, we believe, in refusing to pass on the Chicago Board of Trade's claim that the milling-in-transit limitation violated Section 3(1). Since all parties were on notice of the contention made in the pleadings, and evidence was introduced at the hearing in support of the allegation of discrimination, the Commission was obliged to decide the issue. The basis for its conclusion not to decide the question—that the claims "may be raised in investigation or complaint proceedings"—was a departure from the Commission's long-settled practice of consolidating protests based on other sections of the Act with Section 4 proceedings relating to the same proposed rate. The traditional practice is more likely to effectuate the objectives of the Interstate Commerce Act, which is a unified statutory scheme designed to eliminate discriminatory and predatory rate practices, and it is consistent with this Court's expressed understanding of the Commission's function in a Section 4 proceeding.

II

The evidence in the record was insufficient to sustain the Commission's conclusion that the proposed rate did not constitute a destructive competitive practice. It was undisputed that the rate did not cover the rail carrier's out-of-pocket cost, and this was suf-

ficient to establish a *prima facie* case of violation of the National Transportation Policy's prohibition against destructive competition. While the joint through rate under the proposed schedule may have been reasonably compensatory within the meaning of Section 4(1) of the Act, this did not, *ipso facto*, render the proportional rate reasonable. Since the rail carriers presented no evidence to support a conclusion that the rate was a profitable one, it follows that its effect was to divert traffic from the competing barge lines without producing any gain for the rail carriers. The fact that the reduced rate may have discouraged use of an alternative route which produced greater losses for the rail carriers does not establish that the below-cost rate amounted to fair competition.

III

The Commission failed to pass upon Mechling Barge Line's contention that the examiner had erroneously excluded evidence pertaining to alleged violations of Section 3(4). Although there may be acceptable reasons why the Commission, in its discretion, would prefer to leave such matters to separate proceedings, the actual reasons must be articulated so as to permit judicial review. In light of the established policy of determining all questions bearing on the validity of rates in a single proceeding, it was imperative for the Commission to explain its contrary decision in this case when the issue was raised in the petition for reconsideration.

ARGUMENT

I

THE COMMISSION SHOULD NOT HAVE GRANTED RELIEF UNDER SECTION 4 WITHOUT PASSING ON THE CONTENTION, RAISED IN THE PLEADINGS AND SUPPORTED BY EVIDENCE IN THE RECORD, THAT THE MILLING-IN-TRANSIT LIMITATION VIOLATED SECTION 3(1)

The Chicago Board of Trade's contention regarding the discriminatory nature of the proposed rates was set out in its protest and petition for suspension (R. 104–105, 179, 181, 186, 189). In response, the rail carriers assured the Commission that the discrimination would be eliminated (R. 256). At the outset of the hearing before the examiner, the Chicago Board of Trade's opposition to certain aspects of the proposed rates was reasserted (R. 292), and evidence pertaining to the alleged discrimination against grain merchants was introduced without objection (R. 365–368). Further evidence in this regard was placed in the record, again without objection, at a later stage of the hearing (R. 795, 798–799).

At the conclusion of the hearing, therefore, the issue raised by the Chicago Board of Trade's contention that the milling-in-transit limitation violated Section 3(1) was squarely before the examiner. The applicants had not objected to its consideration during the Section 4 proceedings, and the examiner had not excluded as irrelevant any evidence pertaining to this issue. Although the examiner's conclusion regarding other protests rendered unnecessary any decision on the Section 3(1) contention, the Commission's reversal of the examiner obliged it to consider the alternative

questions which the examiner had not had occasion to reach. The Commission's refusal to consider the alleged discrimination produced by the milling-in-transit limitation, on the ground that it was a matter "which may be raised in investigation or complaint proceedings" (R. 27), was not in our view, a permissible ruling.

Its effect was to compel the protestant to institute a new attack on the proposed rates three years after the original Section 4 application had been filed and to repeat the identical allegations and introduce the same evidence which was already in the record before the Commission. Since all parties to the Commission proceeding had been on notice of the issue, and since full opportunity to develop evidence on all sides had been afforded to the applicants and to the protestants, there was seemingly no occasion for requiring duplication of effort and further delay.

The Commission's own consistent policy—followed both before and after this decision—of disposing of as many related issues as possible in a single Section 4 proceeding supports the view that its action in this instance was an unsound departure from the settled rule. The usual Commission rule regarding consolidation of protests to rates which require Section 4 relief was stated in *Mississippi Railroad Comm'n* v. *Alabama & Vicksburg Ry. Co.*, 120 I.C.C. 569, 573:

> It is desirable in the interest of economy of time and expense, wherever practicable, to hear and dispose of fourth-section applications in connection with formal complaints or investigations involving the same rate under other

> sections of the Act. For that reason these portions of application No. 373 were set for hearing with certain of these cases. This policy has been followed for a number of years. So far as practicable it will be adhered to in the future, and we shall expect carriers to be ready to proceed in support of their fourth-section application at the time set. * * *

Although the above rule applies expressly only to consolidation of *formal* complaints or investigations, the Commission has repeatedly announced that it would not approve a Section 4 application (apparently irrespective of whether other formal complaints have been filed) if the proposed rates were shown to violate other provisions of the Act. As early as 1913, for example, the Commission said (*Railroad Commission of Nevada* v. *S.P. Co.*, 21 I.C.C. 329, 341):

> [T]he proviso authorizing this Commission to permit exceptions to the general prohibition of [Section 4] is not a grant of arbitrary or absolute power, but its exercise must be limited and conditioned upon the presence in special cases of conditions and circumstances which would make such exceptions legal and proper and in no wise antagonistic to other provisions of the act.

This principle has been restated in subsequent Commission decisions[5] and was even reaffirmed after the

[5] See *Transcontinental Cases of 1922*, 74 I.C.C. 48, 71; *Commodity Rates on Lumber and Other Forest Products, In Carloads, From South Pacific Coast Territory To Points In Central Freight Association Territory*, 165 I.C.C. 561, 569; *Differential Routes To Central Territory*, 211 I.C.C. 403, 421; *Bituminous Coal to Buffalo, N.Y.*, 219 I.C.C. 554, 560; *Pig Iron*

Commission's ruling in the present case. In *Bituminous Fine Coal to La Crosse, Wis.*, 311 I.C.C. 257, 263, the Commission recently stated:

> Competition has been the principal special case which we have recognized in granting [Section 4] relief. However, the existence of competition does not *ipso facto* entitle the applicant to relief. The competition relied upon must be examined in relation to the existing circumstances, bearing in mind that we may not grant relief to establish rates that may be in violation of other sections of the act.

This oft-repeated rule expressed an obligation which was not wholly self-imposed. In its Annual Report for 1920, the Commission acknowledged that the Interstate Commerce Act contemplated that it take a broad view of the effects of proposed rates requiring Section 4 relief before granting such an application (34 I.C.C. Ann. Rep. 47):

> In administering this section we proceeded upon the theory that the Congress intended that we should in proper cases exercise the power to grant relief, observing the rules laid down in the other sections of the act, and that

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To Butler, Pa., 222 I.C.C. 1, 2; *Iron and Steel To Minnesota*, 231 I.C.C. 425, 428; *Sand and Gravel to Northfield and Evanston, Ill.*, 234 I.C.C. 65, 68; *Iron and Steel from Minnequa to Kansas, Nebraska, and South Dakota*, 278 I.C.C. 163, 168–169; *Coal and Coal Briquets in the South*, 289 I.C.C. 341, 376–377; *Passenger Fares, Hell Gate Bridge Route, New York, N.Y.*, 296 I.C.C. 147, 153; *Crude Barytes Ore from Missouri to Corpus Christi and Houston*, 299 I.C.C. 505, 508; *Nepheline Syenite from Ontario, Canada, to the East*, 308 I.C.C. 561, 564–565; *Bituminous Fine Coal to La Crosse, Wis.*, 311 I.C.C. 257. See also quotations in Appendix B to the Brief Filed in this case by the Chicago Board of Trade.

> it was appropriate to grant relief when, in our opinion, the resulting rates or fares would not be unjust or unreasonable in violation of the first section or unduly prejudicial in violation of the third section.

Since "the principal evil at which the Interstate Commerce Act was aimed was discrimination in its various manifestations," *New York* v. *United States*, 331 U.S. 284, 296; see *Louisville & N.R. Co.* v. *United States*, 282 U.S. 740, 749–750, it accords with the legislative purpose to apply all the Act's prohibitions against discrimination "as a whole" whenever practicable. In reporting out the Act after an extensive investigation, the Senate Committee on Interstate Commerce stated (S. Rep. No. 46, 49th Cong., 1st Sess., 215 (1886)):

> The provisions of the bill are based upon the theory that the paramount evil chargeable against the operation of the transportation system of the United States as now conducted is unjust discrimination between persons, places, commodities, or particular descriptions of traffic. The underlying purpose and aim of the measure is the prevention of these discriminations, both by declaring them unlawful and adding to the remedies now available for securing redress and enforcing punishment. * * *

The interrelation of the Act's various prohibitions led this Court to conclude in the *Intermountain Rate Cases*, 234 U.S. 476, 485–486, that the Commission's power to relieve carriers from the requirements of Section 4

> * * * is made by the statute to depend upon

> the facts established and the judgment of that body in the exercise of a sound legal discretion as to whether the request should be granted compatibly with a due consideration of the private and public interests concerned *and in view of the preference and discrimination clauses of the second and third sections.* [Emphasis added.]

This construction of Section 4 follows from the observation that the specific prohibition of Section 4 is merely a particularized condemnation of a kind of discriminatory practice which Congress believed pernicious enough to warrant special treatment. See Friendly, *The Federal Administrative Agencies: The Need for Better Definition of Standards*, 75 Harv. L. Rev. 863, 884 (1962). The provision in Section 4 for relief by the Commission in special cases of long haul-short haul discrimination ought not therefore to be read as authorizing the Commission to countenance rates which are otherwise discriminatory.

The unitary design of the Interstate Commerce Act is further emphasized by the enactment in 1940 of the National Transportation Policy, which expressly directed that the Interstate Commerce Act "shall be administered with a view to carrying out" the purposes set forth in the declaration of policy. Among these purposes was the desire "to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; * * *" 54 Stat. 899.

In light of this background, it is apparent that the legislative purpose is best furthered by the consistent course followed by the Commission in other cases—*i.e.*, consolidating all charges of discrimination with the formal Section 4 application and determining, in a single proceeding, whether the rates violate other provisions of the Act as well as whether the criteria set forth in Section 4 have been met. Such consolidated treatment would, in all but exceptional cases, expedite disposition of all protests and prevent duplication of effort. There may, of course, be sound practical reasons why this procedure cannot always be followed. For example, the Commission could not realistically be expected to explore fully all the implications of filed rates which give rise to the hundreds of Section 4 applications which are treated summarily each year.[4] It would therefore be unfair to the Commission to render such a Section 4 order vulnerable because of some discriminatory effect which no party had ever called to the Commission's attention. Or it may be unfair to the applying carrier if its proposed rate is held to violate some provision of the Act other than Section 4 without notice to it or other interested parties that the alleged discriminatory effect is being considered. Similarly, there may be situations in which the Commission, after due consideration, would conclude that separate proceedings on different con-

[4] In the years 1958–61, the Commission received an average of 818 applications for Section 4 relief annually. Supplement to the 75th Annual Report of the Interstate Commerce Commission, p. 64. In the fiscal year ended June 30, 1962, the Commission received 584 applications for Section 4 relief. Only two formal reports relating solely to Section 4 matters were issued. 76th Ann. Rep. 43.

tentions would facilitate disposition of the case. Such a decision would lie within the agency's permissible discretion concerning the conduct of its own proceedings.

But when, as here, the Commission has permitted full development of the issue by way of pleadings and evidence, there appears to be no practical reason to force the parties to begin anew. Considerations of convenience apart, the consequence of such a course is to maintain, for such further period as is required to institute and conclude the new proceeding, a rate which may violate the Act and the National Transportation Policy.

United States v. *Merchant & Manufacturers Traffic Ass'n*, 242 U.S. 178, relied upon by the district court, concerned a belated claim of discrimination made by four cities and their shipping interests. They had not been parties to the Section 4 proceeding wherein certain railroads had been granted relief from the long haul-short haul provision. This Court, speaking unanimously through Mr. Justice Brandeis, observed that the only "necessary party" to a Section 4 proceeding was the applying carrier, and that others were not bound by the resulting order, "at least in the absence" of participation at the hearing. 242 U.S. at 188. Accordingly, the Court concluded that these interests could not initiate an attack on the Section 4 order in the courts, but were obliged to seek relief from the Commission under Sections 13 and 15, which "afford ample remedy." *Ibid.* This decision patently would not apply when the claim of discrimination has been fully presented in the course of the Section 4 proceeding, as in the present case, and when

the protestant has been an active party during the hearing. There is then no danger that such a procedure "would invade and often nullify the administrative authority vested in the Commission." *Ibid.* Indeed, when the allegation of discrimination has been fully presented to the Commission by a party in the Section 4 proceedings, the shoe is on the other foot; the Commission should then be required to decide the issue if its decision is dispositive. For then the principle announced by this Court in *The Chicago Junction Case,* 264 U.S. 258, 265, comes into play: "The provision for a hearing implies both the privilege of introducing evidence and the duty of deciding in accordance with it. To refuse to consider evidence introduced or to make an essential finding without supporting evidence is arbitrary action."

The district court also relied on language in the opinion of a three-judge district court in *Seatrain Lines, Inc.* v. *United States,* 168 F. Supp. 819 (S.D. N.Y.), which expressed the view that the question "whether the rates charged are unduly discriminatory against a competing water carrier * * * must be raised by proceedings under Sections 13 and 15 of the Interstate Commerce Act." 168 F. Supp. at 824. This view is inconsistent with the Commission's own announced practice to consider all provisions of the Act before granting a Section 4 application. See note 5, *supra.* Since no evidence pertaining to alleged discrimination had been presented to the Commission in *Seatrain* (because no hearing was held), it seems probable that the district court was merely reaffirming the rule of *Merchants & Manufacturers Traffic Ass'n, supra,* that protestants who have not presented their

contentions to the Commission in a Section 4 proceeding have an "ample remedy" via Sections 13 and 15. The court was not addressing itself to a situation like the present one in which the protest and supporting evidence have been allowed, without objection, at the Section 4 hearing. If the *Seatrain* opinion was intended to hold that these issues *could* not be raised in a Section 4 proceeding, we believe it to have been in error.

Nor would it be an adequate justification for the procedure followed that the protestants failed to file a formal document titled "Complaint Under Section 13(1)." That would be to exalt form over substance to no purpose.[1] All parties were on notice of the contention made under Section 3(1) by the Chicago Board of Trade, and the issue was fully developed at the hearing without any objection from the appli-

[1] In its Motion to Affirm, the Commission suggested that a difference in the allocation of the burden of proof on the issue of discrimination would result if protestants had filed a separate complaint under Section 13(1) (p. 20, fn. 23). Assuredly, the burden of establishing a prima facie case of discrimination should be borne by protestants. *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 218 F. Supp. 359, 374–5; *Koppers Co.* v. *United States*, 166 F. Supp. 96, 99–100. There is no reason, however, for the burden to shift because the protestants seek to raise issues of discrimination by way of protests and petitions for suspension rather than by a formal complaint under Section 13(1). The Commission has the power to impose the burden of proof on the proper party, without regard to the section of the Act under which the parties have brought the matter before the Commission.

cants or the hearing examiner.[8] No suggestion was made by any party that the failure to file a separate document would bar consideration of the protestants' claim; such technical niceties have no place in the administrative process and should not belatedly put to naught the parties' full presentation of the issue.

Nor did the Commission's incorporation of its standard concluding clause in the temporary Section 4 order and the denial of suspension put the Chicago Board of Trade on notice that a separate document would have to be filed. Although these orders did provide that the proposed rates were "subject to complaint, investigation and correction if in conflict with any provision of the Interstate Commerce Act" (R. 89) and that the refusal to suspend "does not constitute approval of the protested schedules" (R. 90), the protestant was entitled to construe this language in light of the Commission's repeated assertions that Section 4 relief would not be granted if other violations of the Act were demonstrated. See note 5, *supra*. Under these circumstances, the most reasonable construction of this clause—which also appears on the Commission's permanent Section 4 order (R. 30)—is that the proposed rates, like all rates filed with the Commission, are subject to examination and reexamination whenever allegations of discriminatory effect are made.

[8] Since the issue was litigated during the hearing, the rail carriers could not object to an appropriate order, notwithstanding the absence of any formal complaint. See *Kuhn* v. *Civil Aeronautics Board*, 183 F. 2d 839 (C.A.D.C.); *National Labor Relations Board* v. *Sterling Furniture Co.*, 202 F. 2d 41 (C.A. 9).

Finally, the rail carriers' representation that the milling-in-transit limitation, which produced the discrimination, would be eliminated did not justify the Commission's refusal to consider the issue. If the discriminatory effect of the limitation rendered the proposed rate unlawful, it was the Commission's obligation to take appropriate action. By failing to do so, it effectively denied to the protestants any remedy *pendente lite*.[9]

II

THE COMMISSION'S CONCLUSION THAT THE PROPOSED RATES DID NOT VIOLATE THE NATIONAL TRANSPORTATION POLICY'S PROHIBITION AGAINST DESTRUCTIVE COMPETITIVE PRACTICES WAS NOT SUPPORTED BY ADEQUATE FINDINGS OR SUBSTANTIAL EVIDENCE

A. THE NON-REMUNERATIVE PROPORTIONAL RATE APPEARS TO HAVE BEEN PREDATORY

The evidence presented to the examiner established that even after all the rail carrier's adjustments in out-of-pocket cost computation had been made, the cost figure per 100 pounds on an average load and trip on the Belt Line exceeded the proposed rate by almost

[9] It is no answer to this argument to say that the protestants, who have sought judicial review of the Commission's order, are responsible for whatever damage is caused while the order is being reviewed. Even if it be assumed that the milling-in-transit limitation would have been voluntarily eliminated had no review been sought, the protestants would have been required to relinquish other claims asserted in this action in order to accomplish this result. Hence the price of obtaining the elimination of a discriminatory limitation would have been abandonment of other contentions which relate to different aspects of the proposed rates.

1.5 cents (R. 48). The examiner was of the opinion that the actual cost figure was higher than that urged by the rail carriers, but he accepted the lower figure *arguendo* (R. 48–49). The Commission did not disagree with this phase of the examiner's report, although it included in its decision only the examiner's summary of the protestants' cost figures—which were, of course, considerably higher than those presented by the rail carriers (R. 25). Consequently, the record establishes, beyond dispute, that the Belt Line portion of any through transportation under the new rates is non-remunerative.

The Commission reversed the examiner's finding that the proposed rate was non-compensatory, however, because it observed that the proportional rate to Kankakee "has no independent existence, but is an integral part of the rate which applies on the through transportation from Belt origin * * * to delivery of the corn product at its ultimate destination" (R. 25). Since the rail carriers could have chosen to publish only the joint through rate from Belt Line origins to eastern destinations, and since these rates would have been evaluated as published, the Commission concluded that it would be unfair to the rail carriers to condemn the proposed rates because of "the method of publication" (R. 25).

We agree with the Commission's analysis insofar as it relates to the proviso in Section 4(1) which allows the Commission to grant relief from the long haul-short haul prohibition so long as it does "not permit the establishment of any charge to or from the more distant point that is not reasonably compensa-

tory for the service performed." In other words, we agree that the legislative history of the statute,[10] as well as its plain terms, support a construction which prohibits the granting of Section 4 relief only if the total rate for a *longer* haul is not compensatory. Since the figures which are to be compared in this case are the rate for the short haul from Kankakee to the eastern destination and the rate for the long haul from the Belt origin to that destination, the Commission properly rejected the protestants' contention that Section 4 relief was prohibited because the proportional rate from the Belt origin to Kankakee (only part of the long haul) was non-compensatory.

This did not, however, dispose of the distinct contention that the proposed proportional rate from the Belt origin to Kankakee was so low as to amount to a destructive competitive practice. The National Transportation Policy's proscription of unfair and destructive rates was intended, as this Court observed last Term in *Interstate Commerce Commission* v. *New York, New Haven & Hartford R. Co.*, 372 U.S. 744, 759, "to prevent a carrier from setting a rate which would impair or destroy the inherent advantages of a competing carrier, for example, by setting a rate, below its own fully distributed costs, which would

[10] The only indication of the meaning of this exception to the proviso was given by Senator Townsend, who said (59 Cong. Rec. 740):

"It has been wrong and is so now to fix the longer-haul rate so low that in itself it is not compensatory; that is, it does not yield its proper portion of the expense of operation of the railroad system. Then it stands to reason that shorter routes paying the higher proportioned rate must have an additional burden placed upon them. That is wrong."

force a competitor with a cost advantage on particular transportation to establish an unprofitable rate in order to attract traffic." The evil is as possible when the reduced rate is a proportional one as when it is a flat rate. If, for example, carriers *X* and *Y* compete between points *A* and *B*, but only *X* also provides carriage from *B* to *C*, *X* may destroy *Y's* inherent competitive advantage by reducing its proportional rate from *A* to *B* below cost. Even if its joint through rate from *A* to *C* remains compensatory, the reduced proportional rate would compel *Y*, the inherently superior carrier, to offer a nonremunerative rate on traffic destined beyond *B* so as to meet *X's* competition. In order to forestall such a result, the Commission has the duty to consider each factor of a through rate and to determine whether it is destructively competitive *vis-a-vis* any other carriers which provide the same transportation. As this Court, speaking through Mr. Justice Brandeis, said in *Atchison, Topeka & Santa Fe R. Co.* v. *United States*, 279 U.S. 768, 776:

> The Commission's power to declare rates unreasonable applies alike to all rates, be they joint, local or proportional. The Commission may, and in controversies involving through rates often does, deal with one factor only of the combination of rates which make up the through rate. And that factor may be a proportional rate.

In the present case, the barge lines operating along the Illinois River provided transportation from points along the Belt Line to Chicago; ex-barge rail trans-

portation to the East was then available at proportional rates identical to shipments traveling ex-rail through Kankakee. By reducing the proportional rail rate to Kankakee below its own out-of-pocket costs, the New York Central appears to have diverted traffic from the competing barge lines with no profit to itself. Since the record fails to demonstrate that the reduced proportional rate for Belt Line traffic generated any additional traffic for the New York Central from Chicago or Kankakee to the East, the only apparent product of the rate reduction was loss of revenue to the barge lines.

The Commission stated, in conclusory terms, that the proposed rates did not amount to a destructive competitive practice (R. 26, 29). It failed to support this conclusion with any evidence or economic analysis. The examiner's uncontested finding that the proposed rate did not cover out-of-pocket costs constituted a sufficient *prima facie* case of violation of the National Transportation Policy to require the Commission to do more than it did as a basis for granting Section 4 relief.

B. THE NON-REMUNERATIVE RATE IS NOT JUSTIFIED BY THE FACT THAT IT PRODUCES A SMALLER LOSS FOR THE RAIL CARRIERS THAN IS INCURRED ON AN ALTERNATIVE ROUTE

At the hearing the rail carriers sought to prove that the low proportional rate from Belt origins to Kankakee was profitable notwithstanding its failure to cover out-of-pocket costs because it produced more revenue for New York Central than did carriage of ex-barge corn from Chicago to the East via Kankakee. This was because reshipping rates to the East were the

same from Chicago and Kankakee, and shipment through Chicago included the right to stop at Kankakee for milling (R. 303). In other words, corn which was shipped by barge from Belt orgins to Chicago could then be reshipped via Kankakee to the East at the same rate as corn transported by rail to Kankakee; New York Central was, in effect, providing free carriage over the 75 miles from Chicago to Kankakee for ex-barge corn milled at Kankakee. Hence it was urged that any shipments traveling via the Belt Line to Kankakee, which would otherwise have been transported by barge, produced a net gain equal to the proposed proportional rate (which was then 5½ cents) and whatever saving resulted from the elimination of switching costs at Chicago (approximately 2 cents per 100 pounds) (R. 304–305). Believing that this "added revenue spoke for itself" (R. 321), the rail carriers had made no cost study whatever before filing the proposed schedule.

Although it may well be true that the rail carriers reduced their losses by encouraging transportation from Belt origins to Kankakee in place of shipments from Chicago to Kankakee (after carriage by barge from the Belt origins),[11] this consequence does not sustain the proposed rate against an attack based on the National Transportation Policy. For reasons which

[11] This argument assumes that all the corn being transported along the Belt Line under the proposed rate would otherwise have been shipped to the East via Kankakee. The record fails to support this assumption. If, contrary to this assumption, much of the corn transported along the Belt Line would have been shipped to the East directly from Chicago, the rail carriers' calculation is patently erroneous, since no saving whatever is produced by shipment via Kankakee.

do not appear in the record, rail carriers had offered free carriage from Chicago to Kankakee for corn traveling to the East. The barge line, which was competing only between the Belt Line and Chicago or Kankakee and which was not affected adversely by the proportional rate from Chicago to Kankakee, had no reason to object to its non-remunerative character. It would be unfair now to permit the rail carriers to reduce their rates for the competitive route from the Belt origins to Kankakee below out-of-pocket cost—a step which would patently have been a destructive competitive practice had it been taken initially—on the asserted ground that this will reduce the loss incurred on the obviously unprofitable leg from Chicago to Kankakee. The rail carriers' own rate structure from Chicago to the East would thereby become a justification for otherwise unwarranted predatory competition. Indeed, the very same computation which is urged as support for the proposed rate could be used to prove the profitability of *free* carriage from Belt origins to Kankakee—even if there were no charge whatever for that portion of the shipment, the 2-cent switching expense would be saved for every 100 pounds of corn transported on the Belt Line rather than by barge to Chicago. This *reductio ad absurdum* demonstrates that whether or not a rate is predatory within the meaning of the National Transportation Policy cannot be made to depend on whether it has the effect of discouraging use of some other route on which the carrier incurs a loss. Even if a proposed rate increases a carrier's total revenue in this fashion, it constitutes a destructive

competitive practice if it is non-remunerative. The only apparent choices consistent with the national policy prohibiting destructive competition are (1) to adjust the rates on the unprofitable alternative route or (2) to set a rate which covers out-of-pocket or fully distributed costs.

III

THE COMMISSION SHOULD HAVE DECIDED WHETHER THE EXAMINER ERRONEOUSLY EXCLUDED EVIDENCE THAT ADMINISTRATION OF THE PROPOSED RATES RESULTED IN VIOLATIONS OF SECTION 3(4)

Mechling Barge Lines also sought to show that the proposed rate structure results in discrimination against connecting carriers, in violation of Section 3(4), because New York Central receives a 13-cent division of the rate east of Chicago from its connecting carriers when the traffic moves to Chicago via Kankakee on the proposed proportional rate. Since the barge lines did not receive any comparable division of this rate, they contended that Section 3(4) has been violated. The practice of charging less for ex-rail transportation than ex-barge transportation violates Section 3(4), *Interstate Commerce Commission* v. *A. L. Mechling Barge Lines,* 330 U.S. 567, whether accomplished by the use of joint rates, through rates, *Dixie Carriers* v. *United States,* 351 U.S. 56, or rate divisions, *Arrow Transportation Co.* v. *United States,* 176 F. Supp. 411, affirmed *sub nom. State Corporation Commission of Kansas* v. *Arrow Transportation Co.,* 361 U.S. 353. When counsel for the barge line tried to continue his cross-examination on the possible violation of Section 3(4), the hearing

examiner ruled that this issue was not relevant (R. 342–3, 352). The Commission did not mention the alleged violation of Section 3(4) in its report."

We agree that the Commission's discretionary determinations regarding its own procedures are entitled to great weight, and that there may have been acceptable reasons in this case for the exclusion of evidence pertaining to alleged violations of Section 3(4). But in light of the Commission's consistent practice of consolidating all protests to proposed rates which require Section 4 relief, and of the support for this practice in the Act's language and legislative history and in this Court's construction of the Act (see pp. 20–26, *supra*), the reasons underlying this ruling should be judicially reviewable." In the present case, the Commission foreclosed judicial review by supplying "no findings and no analysis * * * to justify the choice made, no indication of the basis on which the Commission exercised its expert discretion." *Burlington Truck Lines, Inc.* v. *United States*, 371 U.S. 156, 167. If, as may be inferred from the Commission's disposition of protests filed by the Chicago

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[12] When the case first came before Division 2 of the Commission, the barge lines supported the examiner's proposed report. Consequently, the examiner's exclusion of evidence pertaining to a Section 3(4) violation was not put in issue. After Division 2 ruled in favor of the rail carriers, however, the barge lines' contention that this evidence should have been admitted was made on petition for reconsideration. This petition was denied without explanation (R. 31).

[13] Compare, for example, *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U.S. 197, 229, where an agency's exclusion of evidence was termed "unreasonable and arbitrary" by this Court.

Board of Trade, it was of the opinion that the appropriate remedy for alleged Section 3(4) violations was a complaint proceeding under Section 13(1) or a Commission-initiated investigation under Section 15(7), this view was not expressed in any "findings specifically directed to the choice between two * * * remedies * * *." 371 U.S. at 168. Consequently, the case should be remanded for further proceedings in which the Commission should pass expressly on the contention that the examiner erroneously excluded the proffered evidence.

CONCLUSION

Accordingly, the United States believes that the judgment of the district court should be vacated and the district court directed to enter judgment setting aside the order of the Commission in these cases and remanding them to the Commission for further proceedings consistent with the principles set forth above.

Respectfully submitted.

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DECEMBER 1963.

APPENDIX

The National Transportation Policy, 49 U.S.C. preceding Section 1, provides:

> It is hereby declared to be the national transportation policy of the Congress to provide for fair and impartial regulation of all modes of transportation subject to the provisions of this Act, so administered as to recognize and preserve the inherent advantages of each; to promote safe, adequate, economical, and efficient service and foster sound economic conditions in transportation and among the several carriers; to encourage the establishment and maintenance of reasonable charges for transportation services, without unjust discriminations, undue preferences or advantages, or unfair or destructive competitive practices; to cooperate with the several States and the duly authorized officials thereof; and to encourage fair wages and equitable working conditions;—all to the end of developing, coordinating, and preserving a national transportation system by water, highway, and rail, as well as other means, adequate to meet the needs of the commerce of the United States, of the Postal Service, and of the national defense. All of the provisions of this Act shall be administered and enforced with a view to carrying out the above declaration of policy.

Section 1(5), 49 U.S.C. 1(5), provides:

> All charges made for any service rendered or to be rendered in the transportation of passengers or property, or in connection therewith, shall be just and reasonable, and every unjust and unreasonable charge for such serv-

ice or any part thereof is prohibited and declared to be unlawful.

Section 3(1), 49 U.S.C. 3(1), provides:

> It shall be unlawful for any common carrier subject to the provisions of this part to make, give, or cause any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic, in any respect whatsoever; or to subject any particular person, company, firm, corporation, association, locality, port, port district, gateway, transit point, region, district, territory, or any particular description of traffic to any undue or unreasonable prejudice or disadvantage in any respect whatsoever: *Provided, however,* That this paragraph shall not be construed to apply to discrimination, prejudice, or disadvantage to the traffic of any other carrier of whatever description.

Section 3(4), 49 U.S.C. 3(4), provides:

> All carriers subject to the provisions of this part shall, according to their respective powers, afford all reasonable, proper, and equal facilities for the interchange of traffic between their respective lines and connecting lines, and for the receiving, forwarding, and delivering of passengers or property to and from connecting lines; and shall not discriminate in their rates, fares, and charges between connecting lines, or unduly prejudice any connecting line in the distribution of traffic that is not specifically routed by the shipper. As used in this paragraph the term "connecting line" means the connecting line of any carrier subject to the provisions of this part or any common carrier by water subject to part III.

Section 4(1), 49 U.S.C. 4(1) provides:

> It shall be unlawful for any common carrier subject to this part or part III to charge or receive any greater compensation in the aggregate for the transportation of passengers, or of like kind of property, for a shorter than for a longer distance over the same line or route in the same direction, the shorter being included within the longer distance, or to charge any greater compensation as a through rate than the aggregate of the intermediate rates subject to the provisions of this part or part III, but this shall not be construed as authorizing any common carrier within the terms of this part or part III to charge or receive as great compensation for a shorter as for a longer distance: *Provided,* That upon application to the Commission and after investigation, such carrier, in special cases, may be authorized by the Commission to charge less for longer than for shorter distances for the transportation of passengers or property, and the Commission may from time to time prescribe the extent to which such designated carriers may be relieved from the operation of the foregoing provisions of this section, but in exercising the authority conferred upon it in this proviso, the Commission shall not permit the establishment of any charge to or from the more distant point that is not reasonably compensatory for the service performed; and no such authorization shall be granted on account of merely potential water competition not actually in existence * * *.

Section 13(1), 49 U.S.C. 13(1), provides:

> That any person, firm, corporation, company, or association, or any mercantile, agricultural or manufacturing society or other organization, or any body politic or municipal organization, or any common carrier, complaining of anything done or omitted to be done by any common carrier subject to the provisions of this

part, in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the complaint thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint, or to answer the same in writing, within a reasonable time, to be specified by the Commission. If such common carrier within the time specified shall make reparation for the injury alleged to have been done, the common carrier shall be relieved of liability to the complainant only for the particular violation of law thus complained of. If such carrier or carriers shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper.

Section 15(7), 49 U.S.C. 15(7), provides:

Whenever there shall be filed with the Commission any schedule stating a new individual or joint rate, fare, or charge, or any new individual or joint classification, or any new individual or joint regulation or practice affecting any rate, fare, or charge, the Commission shall have, and it is hereby given, authority, either upon complaint or upon its own initiative without complaint, at once, and if it so orders without answer or other formal pleading by the interested carrier or carriers, but upon reasonable notice, to enter upon a hearing concerning the lawfulness of such rate, fare, charge, classification, regulation, or practice; and pending such hearing and the decision thereon the Commission, upon filing with such schedule and delivering to the carrier or carriers affected thereby a statement in writing of its reasons for such suspension, may from time to time suspend the operation of such

schedule and defer the use of such rate, fare, charge, classification, regulation, or practice, but not for a longer period than seven months beyond the time when it would otherwise go into effect; and after full hearing, whether completed before or after the rate, fare, charge, classification, regulation, or practice goes into effect, the Commission may make such order with reference thereto as would be proper in a proceeding initiated after it had become effective. If the proceeding has not been concluded and an order made within the period of suspension, the proposed change of rate, fare, charge, classification, regulation, or practice shall go into effect at the end of such period; but in case of a proposed increased rate or charge for or in respect to the transportation of property, the Commission may by order require the interested carrier or carriers to keep accurate account in detail of all amounts received by reason of such increase, specifying by whom and in whose behalf such amounts are paid, and upon completion of the hearing and decision may by further order require the interested carrier or carriers to refund, with interest, to the persons in whose behalf such amounts were paid, such portion of such increased rates or charges as by its decision shall be found not justified. At any hearing involving a change in a rate, fare, charge, or classification, or in a rule, regulation, or practice, after the date this amendatory provision takes effect, the burden of proof shall be upon the carrier to show that the proposed changed rate, fare, charge, classification, rule, regulation, or practice is just and reasonable, and the Commission shall give to the hearing and decision of such questions preference over all other questions pending before it and decide the same as speedily as possible.

U.S. GOVERNMENT PRINTING OFFICE: 1905